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October 10, 2003

Via Messenger

Mr. Bryant L. VanBrakle
Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573

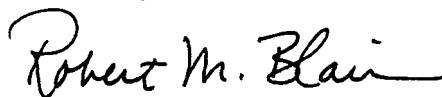
Re: In the Matter of Petitions of United Parcel Service, Inc. (P3-03), the
National Customs Brokers and Forwarders Association of America, Inc.
(P5-03), Ocean World Lines (P7-03), BAX Global, Inc. (P8-03) and C.H.
Robinson Worldwide, Inc. (P9-03)

Dear Mr. VanBrakle:

Enclosed for filing please find the original and fifteen (15) copies of the **above-**
referenced proceeding. We note that the consolidated comments address the five
separate petitions named above. Also enclosed is a copy of this letter and its
enclosures for your acknowledgement of receipt.

Should you have any questions regarding this matter, please do not hesitate to
contact the undersigned.

Sincerely,



Robert M. Blair,
Director, Economics
and Policy Analysis

Enclosures



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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

Comments of the

World Shipping Council

Before the

Federal Maritime Commission

Comments on

In the Matter of the Petitions of United Parcel Service, Inc. (P3-03), the National Customs Brokers and Forwarders Association of America, Inc. (P5-03), Ocean World Lines (P7-03), BAX Global, Inc. (P8-03) and C.H. Robinson Worldwide, Inc. (P9-03)

October 10, 2003

The World Shipping Council (“WSC” or the “Council”) submits these comments in response to the Commission’s notices requesting public comment on petitions P3-03, P5-03, P7-03, P8-03, and P9-03, filed respectively by United Parcel Service, Inc. (“UPS”), the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”), Ocean World Lines (“OWL”), BAX Global Inc. (“BAX”), and C.H. Robinson Worldwide, Inc. (“CHRW”).

The Council, a non-profit association of over forty international ocean carriers, addresses public policy issues of interest and importance to the international liner shipping industry. The Council’s members (listed in Appendix A) include the full spectrum of ocean common carriers, from large global operators to trade-specific niche carriers, offering container, roll-on roll-off, car carrier and other international transportation services. They carry more than 90% of the United States’ imports and exports transported by the international liner shipping industry, or roughly \$500 billion worth of America’s foreign commerce each year. The Council’s members have a strong interest in ensuring that any changes to the Shipping Act’s regulatory requirements are addressed in an appropriate manner.

A. OVERVIEW OF THE PETITIONS

Petitioners have proposed different approaches to a very similar objective. Each petition raises the common question of whether the Commission should change the way non-vessel-operating common carriers (“NVOCCs”) are to be regulated under the Shipping Act of 1984 (“Shipping Act” or “Act”). Congress has addressed that issue on a number of occasions, most recently in the Ocean Shipping Reform Act of 1998 (“OSRA”).

The Council provides these comments in an effort to be of assistance to the Commission as it reviews these petitions. In Part B of this submission, we provide some general comments on the current regulatory regime, and then more specific comments on the particular requests for Commission action made in the petitions. The Council believes that the Commission should not act on the UPS petition for the reasons stated in Part C of these comments.

The Council notes that the NCBFAA petition proposes alternative suggestions: one suggested approach being a broad Section 16 exemption, and an alternative suggested approach being a rulemaking proceeding to consider tariff range rates. As explained in Part D of these comments, the Council does not believe the Section 16 exemption approach suggested by NCBFAA is appropriate; however, it would not oppose the Commission undertaking a properly structured proceeding as requested in the alternative by NCBFAA in order to consider the possibility of a tariff range rate regime for NVOCCs. The Council believes that, if the Commission is disposed to consider such an approach, the most appropriate proceeding, given the broad implications of the issues raised and the need for the concept to be more precisely defined, would be a notice of inquiry or an advance notice of proposed rulemaking that could help clarify and shape the

issues that the Commission would want addressed. Thereafter, if the record compiled so indicates, the Commission could proceed with a notice of proposed rulemaking that addresses NVOCC tariff filing obligations in an orderly and comprehensive fashion, with some assurance that all relevant facts are before the Commission.

In Parts E, F, and G, the Council comments on the petitions filed by OWL, BAX, and CHRW.

B. GENERAL COMMENTS

All common carriers in U.S. international liner shipping are required to publish tariffs. If an enterprise wishes to act as a common carrier in U.S. international liner trades, it must conduct its business pursuant to FMC oversight, and price its services using an FMC regulated commercial instrument – a tariff or service contract. Service contracts are, pursuant to the terms of the Shipping Act, instruments that vessel-operating common carriers (“VOCCs”) may enter into, but all common carriers must publish tariffs.

Tariffs are quite clearly not, as NCBFAA alleges in its petition, instruments that are required or regulated because of VOCCs’ membership in carrier agreements that have limited, regulated antitrust immunity. If that were the purpose, the Shipping Act would never have required NVOCCs to operate pursuant to tariffs in the first place, nor would VOCCs that are not members of carrier agreements have to publish tariffs.

Enterprises acting as NVOCCs must publish tariffs because NVOCCs want to be considered and want to present themselves to the marketplace as “carriers,” notwithstanding the fact that they do not own or operate any ships that physically transport or carry cargo. In order to be accorded common carrier status, one must comply with the Shipping Act’s common carrier obligations.

Third party transportation enterprises that do not wish to be regulated as common carriers may and do operate as freight forwarders, and thereby avoid carrier obligations and regulation. That is commonly done by many ocean transportation intermediaries, which sometimes act as forwarders, sometimes as consolidators, and sometimes as NVOCCs.¹

Finally, the Council notes as a general observation that there is no evidence of harm under the current regulatory structure. NVOCC market growth has been

¹ The Petitions do not clearly distinguish between the functions and activities of an ocean transportation intermediary/forwarder and an NVOCC. For example, the UPS Petition represents that Petitioner provides services as “both an ocean transportation intermediary (“OTI”) and non-vessel operating common carrier” UPS at 1. See *also*, for example, CHRW at 10-13. The Council predicates its comments on the assumption that the Petitions seek relief only for entities that operate as NVOCCs.

substantial, and there is no data offered by the Petitioners showing that the regulatory structure embodied in the Shipping Act has impeded this growth.

In terms of total numbers, NVOCCs as a group have been growing, especially NVOCCs that are also ocean freight forwarders.*

	Pre-OSRA	1 Year After OSRA	2 Years After OSRA	June 2003
NVOCCs Only	2,200	1,900	1,878	2,057
NVOCCs/Ocean Freight Forwarders	400	525	818	898
Total NVOCCs	2,600	2,425	2,696	2,955

As the UPS petition makes clear, NVOCCs are expanding and innovating their service offerings today under the existing regulatory system and are offering “comprehensive and innovative integrated logistics services to large and small shippers.”³ In fact, the UPS petition discusses how UPS has current advantages in the marketplace,⁴ and its website discusses the array of new ocean logistics options it is currently offering its customers. Similarly, the NCBFAA petition demonstrates that the lack of service contracting authority has not impeded NVOCCs’ business growth or their ability to use “individualized rates and services with their customers.”⁵ Further, the profitability of these enterprises appears relatively healthy. In short, there is no evidence that the current regulatory structure has impaired NVOCCs’ growth, services, or ability to be profitable.

We turn next to the individual petitions.

C. THE UPS PETITION

1. The Petition Is Unnecessary.

Petitioners seeking exemptions under Section 16 bear the burden of demonstrating the need for and the appropriateness of the requested relief.⁶ Here, UPS – a

² Data for pre-OSRA NVOCC numbers and the first two years under OSRA are from the FMC’s September 2001 OSRA report, page 86. Data as of June 2003 are from the FMC Bureau of Consumer Complaints and Licensing. The June 2003 data show a total of 2,955 NVOCCs, of which 2,207 are US-based, and 748 are foreign-based. Of the US-based NVOCCs, 898 are both NVOCCs and freight forwarders.

³ UPS at 15. See also the petition’s discussion of services presently being offered under existing regulations at 5.

⁴ *Id.* at 15.

⁵ NCBFAA at 7.

⁶ See *Motor Vehicle Manufacturer’s Ass’n of the United States, Inc.-Application for Exemption of Vehicle Shipments from Portions of the Shipping Act of 1984*, 25 S.R.R. 849, 850 (F.M.C. 1990), and 46 C.F.R. § 502.155.

tremendously successful and admired company by any measure – has demonstrated that it is fully able to obtain the relief that it seeks without an exemption from the requirements of the Shipping Act. Specifically, all that UPS needs to do to qualify as an “ocean common carrier” (i.e., VOCC) authorized to enter into service contracts with its customers is to become a vessel operating carrier in the U.S. foreign commerce. The petition demonstrates that this would be no stretch at all for UPS. As its petition points out, UPS had corporate revenues in 2002 of \$31.3 billion, and has 360,000 employees.⁷ UPS operates a fleet of 88,000 vehicles and 581 aircraft.* UPS’ transportation assets cost more than \$25 billion, and it has a market capitalization of \$33.2 billion.’ UPS’ continued investment in transportation assets is substantial, with average capital expenditures of \$2 billion per year.

UPS, by virtue of the very size, success, transportation assets, and financial power that it argues should make it eligible for an exemption, has the ability through its own actions to make the requested exemption unnecessary. To date, at least, UPS has made a choice to operate as an NVOCC without any ocean transportation assets with respect to its ocean transportation activities. That choice, however, is not required either by the Act or by UPS’ financial circumstances. UPS could easily acquire the rights it seeks in the exemption petition simply by exercising a readily available commercial option – i.e., to charter ocean transportation assets. Another former NVOCC that wanted to transform its status to a VOCC capable of offering service contracts – Sinotrans – did so quite easily. There is no reason that a company of petitioner’s size, resources, trade volumes, capital, and experience in transportation asset management cannot do the same.

2. The Petition Seeks Relief Under Section 16 that is Beyond the Commission’s Power to Grant.

The UPS petition requests that “the Commission grant an exemption pursuant to Section 16 of the Shipping Act to permit UPSOFS to utilize confidential service contracts with its shippers.”” Section 16 of the Act provides in relevant part that:

“The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of those persons *from any requirement of this Act* if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.””

The UPS petition nowhere states the specific “requirement of this Act” from which it seeks exemption. In fact, UPS does not seek to be freed from any requirement

⁷ UPS at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ UPS at 1.

¹¹ 46 U.S.C. app. § 1715 (emphasis added).

of the Act. Instead, it is asking the Commission to grant it an affirmative privilege that is not otherwise available to NVOCCs under the Act, i.e., the right of vessel operating common carriers to satisfy their rate publication/tiling obligations through the filing of service contracts and the publication of required essential terms. That the petition does not seek an exemption at all is not merely a technical failing. The Commission, like other regulatory agencies, is a creature of statute and delegated authority. Congress to a degree conferred power upon the Commission through Section 16 to relieve regulated entities from “any requirement” of the Act. Congress did not, however, authorize the Commission to use Section 16 to bestow affirmative rights beyond those that Congress chose to include. As a simple matter of statutory authority, therefore, the Commission is without power to grant the requested relief. On that basis alone, the petition as currently structured must be denied.

That the relief sought is in the form of an affirmative grant of authority as opposed to an exemption from a requirement of the Act is emphasized by the fact that NVOCCs sought and failed to obtain precisely the same affirmative relief from Congress during consideration of the Ocean Shipping Reform Act (“OSRA”). Specifically, Senator Gorton offered an amendment that would have authorized NVOCCs to enter into service contracts. That amendment, which addressed only that specific issue, was debated and defeated by a roll call vote of 72 against and 25 for.¹²

3. The UPS Petition’s Characterization of Other NVOCCs

Other than assertions that service contract filing would be more convenient than tariff publication, UPS’ main argument for why it believes an exemption is appropriate – even though its NVOCC business is plainly thriving under the current regime – appears to be that somehow NVOCCs that are owned by or otherwise affiliated with VOCCs have an unfair advantage over UPS’ NVOCC.¹³ The argument is factually inaccurate. All NVOCCs, whether or not affiliated in some way with a VOCC, must comply with the same tariff tiling regulations. The CHRW petition correctly points out that NVOCCs that are affiliated with VOCCs are subject to precisely the same regulatory requirements as all other NVOCCs.¹⁴

On a related point, UPS argues that there has been significant consolidation in the VOCC industry since the passage of OSRA.¹⁵ The suggestion is that such consolidation, coupled with the fact that some VOCCs have NVOCC affiliates, constitutes a significant change in the industry landscape since the passage of OSRA. As noted immediately above, the affiliation or non-affiliation of an NVOCC with a VOCC has no impact on the regulatory treatment of that NVOCC under the Act. As to the suggestions that the VOCC industry is highly concentrated and that certain carriers have “substantial market

¹² 144 Congressional Record S.3311 (April 21, 1998).

¹³ UPS at 11-12.

¹⁴ See CHRW at 16-17.

¹⁵ *Id.* at 10.

power,”¹⁶ both are demonstrably untrue. Petitioner’s own Appendix C, upon which it relies in support of its market power claims, shows that even the largest of the carriers in 2002 had only 16% of that part of the market that is represented by the top ten carriers in the transpacific inbound trade. The actual market share of the largest carrier in that trade for 2002 was approximately 11%.¹⁷ Eleven percent of a market that has at least twenty major competitors does not even approach “market power” under any definition of the term. Indeed, the ocean shipping industry is more competitive and less concentrated than other transportation modes.

4. The Petition Does Not Provide Any Guiding Principle for the Commission.

The UPS petition seeks an “exemption” only for UPS. Indeed, the petition suggests that the primary reason why an exemption should be considered for this company is its large size and asset base, its U.S. base of operations, and its financial strength.’¹⁸ That rationale, if accepted, would appear to preclude the grant of similar exemptions for other NVOCCs without similar asset bases and characteristics. As such, the competitive impact on the NVOCC industry would be placed squarely at issue by the petition.¹⁹

The UPS petition proposes a substantial change to the existing regulatory structure without providing even any suggestion for what principles should guide the Commission’s consideration of the many subsequent petitions that would certainly be filed by other parties seeking similar exemptions. There are roughly 3,000 NVOCCs currently registered with the Commission. It is clear that the UPS petition expects other NVOCCs to file petitions seeking similar exemptions, but it offers the Commission and the industry no clear principles or guidance to be used in assessing what entities (other than the petitioner) should be entitled to such treatment and what entities should not. Such a major change of the regulatory system would require a clear, coherent and predictable governance principle and set of criteria that are simply absent from the petition,

UPS seems to suggest that it is not a direct competitor with other ocean transportation intermediaries (OTIs), stating that other OTIs “are in a somewhat different market niche than UPS. . . .”²⁰ The only differentiating factor that UPS offers in support of this proposition is that UPS “is first and foremost a parcel delivery operation using its own transportation assets.”²¹ UPS does not explain the significance of the fact that its primary business is parcel delivery, does not limit its exemption request to the carriage of parcels, and does not explain the basis for its claim that it does not compete with other

¹⁶ UPS at 10.

¹⁷ Journal of Commerce, May 26-June 1, 2003, 28-30.

¹⁸ UPS at 2-3, 21-22.

¹⁹ See 46 U.S.C. app. 1715 (exemption may be granted if it “will not result in substantial reduction in competition or be detrimental to commerce.”)

²⁰ *Id.* at 21.

²¹ *Id.*

NVOCCs. From its description of the broad range of services that it provides, it would appear that it does so compete.

The other argument that UPS makes in terms of competitive impact on other OTIs is that “large OTIs that are part of vertically integrated VOCC organizations already have, in essence, the same authority as UPS seeks.”²² As the Council notes above, this is factually incorrect. NVOCCs that are affiliated with VOCCs are subject to the same rules as other NVOCCs. UPS provides no argument or evidence to suggest otherwise, nor could it.

D. THE NCBFAA PETITION

The NCBFAA petition presents two alternative proposals for the Commission’s consideration. One approach is its request for a Section 16 exemption for all NVOCCs from the applicable tariff filing requirements of Section 8 of the Act, and an exemption from numerous provisions of Section 10. In contrast to the UPS petition, the NCBFAA petition does clearly identify the statutory requirements of the Act from which it proposes an exemption. Recognizing the very substantial and sweeping nature of this request and the obvious problem of proposing the repeal of a regulatory requirement that the Congress just recently and clearly reaffirmed, NCBFAA requests in the alternative, “if the Commission believes that it is without authority to exempt NVOCCs totally from the publication and enforcement provisions of the Act,”²³ that the Commission initiate a rulemaking to consider adopting rules authorizing “range rate” tariffs.

For the reasons stated below, as the petition itself seems to recognize, the Council believes that the Section 16 exemption request is beyond the Commission’s authority to grant. However, as noted in Part A of these comments, the Council would not object to the initiation of an appropriately structured proceeding to consider NCBFAA’s alternative request for range rate tariffs,

1. Historical Perspective.

The NCBFAA Section 16 exemption request is not novel. In 1991, the International Federation of Freight Forwarders Associations (“FIATA”) filed a petition with the Commission seeking exemption under Section 16 of the tariff tiling requirements in Section 8 of the Act. After receiving comment on the petition, the Commission denied the petition because the petitioners did not sustain their burden of demonstrating that the exemption was necessary and in compliance with the statutory requirements:

“In the instant case, Proponents have not met their burden. Proponents’ primary evidence consists of policy arguments of counsel and unverified statements

²² UPS at 21.

²³ NCBFAA at 4.

attached to their Petition. They have not presented the Commission with sufficient relevant, material, reliable, and probative evidence upon which the requisite findings can be made. Moreover, Opponents of the Petition have disputed and otherwise raised significant concerns about both the policy arguments and the “facts” presented by Proponents in support of the requested relief, making the Commission findings even more difficult at this time. The Petition raises a large number of issues of fact that cannot be adequately resolved in the record of this proceeding and as a result, the relief requested cannot be granted.”²⁴

Six days after the Commission denied the FIATA petition, the Commission published notice of its initiation of an Advance Notice of Proposed Rulemaking in Docket No. 92-22, *Tariff Filing By Non-Vessel-Operating Common Carriers*. In that proceeding, the Commission considered a number of related issues associated with different possible forms of relief from the NVOCC tariff filing requirements. On June 4, 1993, after receiving voluminous comments, the Commission issued an order discontinuing the proceeding. In that order, the Commission explained that the record simply did not provide any basis for promulgating rules granting exemptions from the NVOCC tariff filing requirements: “The Commission has thoroughly reviewed the comments submitted in this proceeding and concludes that no further rulemaking is warranted.”²⁵

The Commission’s orders denying the FIATA petition and terminating its NVOCC tariff rulemaking proceeding may be applied with equal force to the first alternative presented in the pending NCBFAA petition – namely a Section 16 exemption from tariff requirements and Section 10 prohibitions.

The other point of historical perspective that warrants comment before turning to the specifics of the petition is the suggestion that NVOCC tariff filing is somehow an anomaly that Congress perhaps never intended to impose.²⁶ The petition cites no authority for this proposition, and there is none. As the petition itself acknowledges, NVOCCs have been recognized as common carriers and required to file tariffs since 1961.²⁷ In the 1984 Act, that status was codified through the definitions of “common carrier” and “non-vessel-operating common carrier.” The tariff filing requirements applied then, as they do today, to all common carriers. That Congress expressly intended to apply the tariff filing requirements to NVOCCs was reinforced in the Non-Vessel-Operating Common Carrier Amendments of 1990 (section 710 of P.L. 101-595). That law, which added section 23 to the Act, provided that the Commission could cancel an NVOCC’s tariff if the NVOCC failed to maintain the required bond. Tariff cancellation

²⁴ *Petition for Exemption From the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984*, Order Denying Petition, 26 S.R.R. 240, 2246 (F.M.C., May 1, 1992).

²⁵ *Tariff Filing By Non-Vessel-Operating Common Carriers*, Order Discontinuing Proceeding, 26 SRR 965 (F.M.C. 1993).

²⁶ See NCBFAA at 2.

²⁷ *Id.* at 6, *citing* P.L. No. 87-346.

would be an odd statutory remedy indeed if Congress had never intended NVOCCs to file tariffs.

Furthermore, in the OSRA amendments in 1998, Congress maintained tariff filing requirements for all common carriers, including NVOCCs, even though Congress was fully aware of the Commission's denial of the FIATA petition and could have eliminated NVOCC tariff filing, or all tariff filing, if it had wanted to. Instead, it explicitly retained the requirement.²⁸

Similarly, NCBFAA suggests that tariff filing was intended as a counter-weight to the limited antitrust immunity provided by the Act to VOCCs that file agreements with the Commission.²⁹ That is also simply incorrect, as discussed above. All common carriers are required to file tariffs, not just those that participate in agreements that are regulated under the Shipping Act instead of the antitrust laws. The tariff filing provisions of the Act and the limited antitrust immunity provisions of the Act are entirely independent.

2. The Section 16 Relief Requested by the NCBFAA Petition Would Remove NVOCCs From Most Regulation Under The Shipping Act.

Despite its description of the relief requested as “limited,”³⁰ the scope of the relief requested by NCBFAA in its Section 16 exemption alternative is in fact sweeping. “[T]he NCBFAA asks that NVOCCs be exempted from Sections 8(a), (b), (d), and (e), and Sections 10(b)(1), (2), (4), (7), (8) of the 1984 Act.”³¹ If this were granted, the Commission would have no routine access to rate data for NVOCCs. NVOCCs would be outside of any regulatory system for monitoring their commercial relationships with their customers. In contrast, VOCCs must file all of their service contracts with the Commission and publish certain of the “essential terms” of those contracts. For cargo that does not move under service contract (and even the UPS and CHRW petitions acknowledge that NVOCCs move cargo under VOCC tariffs³²), VOCCs must file tariffs just as NVOCCs do.

Not only would the NCBFAA Section 16 exemption proposal take NVOCCs out of the rate publication/filing system, but the request for exemption from certain of the section 10(b) prohibitions is clearly excessive. For example, while a Section 8 exemption would logically require a 10(b)(2)(A) exemption, there is no such logical requirement for a complete exemption from Section 10(b)(1). That provision prohibits circumvention of

²⁸ Indeed, even the OWL Petition recognizes that “the possibility exists that Commission will not rule favorably on either or both [UPS and NCBFAA] petitions on the grounds that *its statutory authority does not extend to matters which Congress has addressed directly in its legislation*” OWL at 2 (emphasis added). The legislative history of OSRA clearly shows that Congress considered the elimination of tariff requirements but chose not to do so.

²⁹ NCBFAA at 2, 7.

³⁰ *Id.* at 1.

³¹ *Id.* at 4.

³² UPS at 4-5, and CHRW at 11.

carrier rates by false billing, false classification, false weighing, etc. In addition to the commercial mischief that would be caused by sanctioning such behavior, activities such as false weighing and false description implicate safety and security concerns that cannot be overlooked. Similarly, the requested exemption from Section 1 O(b)(4), if granted, would remove NVOCCs from all prohibitions on unfair or unjustly discriminatory practices. Exemption from Section 10(b)(8) would have a similar effect. As to Section 1 O(b)(7), the petition does not provide an explanation for allowing NVOCCs to offer deferred rebates.

The petition seems to assume, without explanation, that Section 10 common carrier requirements should automatically go away if a tariff filing exemption is granted. In so doing, the petition seeks more than repeal of a statutory publication requirement. Instead, it would, except for the bonding requirement for NVOCCs, remove regulatory oversight from that sector of the industry. There is no evidence that Congress intended Section 16 to authorize that sort of sweeping re-write of the Act. Furthermore, it is certain that any such action, even if theoretically permissible under Section 16, would require a far stronger explanation and justification than that offered by the NCBFAA petition.

The inappropriateness of the Section 10 relief sought is highlighted by the fact that NVOCCs under the NCBFAA proposal would retain for themselves in their role as “shippers” common carrier protections that the petition would deny to their own customers. For tariff shipments, NVOCCs as shippers would retain the protections of all of the Section 10 provisions from which they seek exemption. In addition, because the requested relief would not alter the statutory definitions of “non-vessel-operating common carrier” or “common carrier,” NVOCCs would retain the common carrier right to limit their liability under COGSA. They would retain their “shipper” status in relationship to VOCCs, which allows them to obtain transportation services and to participate in shippers’ associations and thus jointly negotiate with VOCCs for volume discounts. In addition, as common carriers, NVOCCs have a right under maritime law to place a lien on cargo. All of these advantages flow from NVOCC’s dual statutory status as (1) common carriers with respect to their customers and (2) shippers with respect to the VOCCs that provide the actual transportation that allows NVOCCs to exist. The Shipping Act ties those statutory privileges to common carrier obligations. The petition seeks exemption from those common carrier obligations, but retains all of the beneficial protections for NVOCCs, thus altering the Act’s balance between rights and responsibilities. Because those rights and responsibilities are designed to work as a complete regulatory regime, it is not permissible to remove the responsibilities without examining the rights. The petition entirely fails to address this question.

3. The Section 16 Exemption Request Does Not Provide Adequate Factual Support For An Exemption.

As the cases discussed above indicate, the Commission has properly interpreted Section 16 as requiring a solid factual record as a mandatory prerequisite to the granting

of any exemption. The NCBFAA petition does not meet that standard. Without addressing each of the unsubstantiated factual assertions raised by the petition, we address below several of the prominent points.

The NCBFAA petition argues at pages 9 and 10 that shippers do not use NVOCC tariffs. In support of this proposition, the petition states that “NVOCCs that maintain their tariffs on Internet websites uniformly report that ‘hits’ on their tariff web pages are extremely rare.”³³ No affidavit, study, or specific information is offered in support of this statement. In the same paragraph, the petition does cite (but does not attach as an exhibit) a poll of NCBFAA members who purportedly replied in large numbers “that the posting of tariffs on the Internet was ‘Not At All Useful’ to their customers.” Clearly, such a poll -- whatever methodological issues might lead one to question its results -- did not ask shippers the question.

The petition next argues that tariffs are superfluous because “it is far easier – not to mention cheaper – to obtain an NVOCC’s applicable rates by calling, faxing or emailing the NVOCC and asking for a rate quote. . . .”³⁴ This argument is inadequate. In addition to questions concerning rates, many shippers are likely to have questions regarding the services proffered that cannot be easily resolved on tariff websites. As a result, it would not be surprising if many shippers did choose to deal with NVOCCs by telephone or e-mail. It does not follow that there is no commercial or regulatory value in having common carrier tariffs publicly available.

The petition states that there are substantial costs associated with tariffs that outweigh the usefulness of the tariffs, but does not identify with any meaningful specificity what the costs of tariff publication are. The only source cited is the same poll cited for the proposition that shippers do not use tariffs.³⁵ That poll, which again is not attached as an exhibit, purports to show that a majority of OTIs responding to the poll estimated the costs of regulatory compliance at between 3% and 5% of their “administrative resources.” The petition does not identify what other “regulatory costs” were included in addition to tariff costs, what part of an NVOCC’s total budget might be made up of “administrative resources” or how much these costs actually are, or how much of these costs would be incurred anyway as part of the NVOCC’s pricing practices. In other words, the petition is quite vague on the question of cost.³⁶

³³ NCBFAA at 9.

³⁴ NCBFAA at 9.

³⁵ NCBFAA at 11.

³⁶ The only cost for which the petition provides any concrete examples is the cost of paying penalties for violations of the Act. NCBFAA at 12. Whatever the merits of the penalty amounts in those cases -- a point that is the subject of a legitimate, but separate, debate -- it is not persuasive to argue for the removal of a statutory requirement on the basis that one is being fined too much for violating it.

4. The Petition's Section 16 Request Does Not Demonstrate Conformity With The Statutory Exemption Criteria.

At the end of its petition, NCBFAA devotes two paragraphs to the central question before the Commission; i.e., whether the requested exemption meets the Section 16 criteria. The cursory treatment there offered does not satisfy petitioner's burden.

On the issue of the effect of the petition on competition, NCBFAA argues that granting the exemption "would put NVOCCs on an equal footing with other intermediaries and VOCCs, thus increasing the overall level of competition in the industry."³⁷ The argument is without merit for two reasons. First, the Shipping Act very clearly intends that NVOCCs and other OTIs *not* be treated the same. NVOCCs are OTIs that choose to act as carriers and are regulated as such. Freight forwarders by definition do not take responsibility for the transportation, and they therefore operate in a separate market for both regulatory and competition analysis purposes.

Second, with respect to the comparative regulatory burdens on NVOCCs and VOCCs, it is incorrect that granting the requested exemption would place NVOCCs and VOCCs on an equal footing. As discussed above, the requested exemption would take NVOCCs entirely out of the system of publishing or filing rates. VOCCs, on the other hand, would continue to be required to file their service contracts with the Commission, publish certain essential terms, and file tariffs covering all moves not reflected in service contracts. Granting the exemption would place NVOCCs in a preferred regulatory position. Congress structured the differences in the regulatory system consciously and deliberately, and they should not be overturned by such a Section 16 request.

5. NCBFAA's Alternative Request of the Commission

The alternative request from the NCBFAA is that the Commission should consider a rulemaking that could address the issues involved in the possible establishment of tariff range rates. While the Council believes that there would be a number of significant questions about how the Commission would construct such a range rate rulemaking, we would not object to the Commission undertaking such an initiative as a way to consider the issue and its appropriateness as a mechanism to reduce the alleged burdens and costs of tariff publication and penalties for minor tariff infractions about which NVOCCs complain.³⁸

³⁷ NCBFAA at 14.

³⁸ At this point the "range rate" concept is not clearly defined. It would clearly need to be defined and well justified, and could not be so broad as to in effect repeal the tariff filing obligation that Congress has clearly established. However, this alternative in the NCBFAA petition does potentially show a way to address the issues being raised in these petitions in a manner that does not require the Commission to try to repudiate a clear Congressional decision on service contracting authority or to consider a wholesale repeal of a tariff regime that was clearly intended to govern.

E. THE OWL PETITION

This petition “seeks a rulemaking that would expand the definition and scope of the term “special contracts”³⁹ to include all OTIs”. Although one may admit that this is a creative and unique suggestion, it is unworkable and is clearly inconsistent with the regulatory structure of the Shipping Act.

This petition ignores the fact that Congress clearly did not intend to regulate all OTIs in the same way. There are freight forwarders, and there are NVOCCs. They are not the same. The fundamental distinction is that one is an agent for a shipper or consignee and the other acts as a regulated carrier. The Shipping Act could not be clearer that NVOCC OTIs are required to publish and operate pursuant to tariffs and that freight forwarder OTIs, which are not carriers, do not.

A “special contract is a contract for *freight forwarding services* which provides for a periodic lump sum fee”.⁴⁰ Such contracts govern activities of freight forwarders. They do not govern activities of NVOCCs. The OWL petition proposes that a particular kind of forwarding contract, which OWL itself characterizes as “an anachronistic term,”⁴¹ be miraculously transmogrified into a new kind of common carrier contract. The law clearly does not anticipate or create such an instrument. In fact, it is difficult to imagine how the Act could be clearer. If an OTI acts as a freight forwarder, it is not a carrier, and it does not need to publish tariffs. If an OTI acts as a NVOCC, it is a carrier, is regulated differently and operates pursuant to a tariff.

The distinction is important not only because of the conceptual confusion associated with importing freight forwarder regulation into the common carrier realm, but also because the regulatory changes that OWL proposes⁴² would lead to substantial practical uncertainty as to the role of any given OTI with respect to any given shipment. By combining rules for freight forwarders and NVOCCs into a single regulation using a single regulatory vehicle (“special contract”), the OWL proposal runs a very real risk of placing carriers, shippers, and the government in the position of not being able to tell whether the entity that they are dealing with is taking responsibility for the transportation (i.e., the entity is acting as an NVOCC) or not (i.e., the entity is acting merely as a freight forwarder). This goes to the heart of the contractual relationship and affects issues such as who is responsible for paying the VOCC, who has a right to the cargo, who has a right to place a lien on the cargo, who must post a carrier bond, and who has what security obligations in filing advance shipment information with the Bureau of Customs and Border Protection. These are core regulatory and shipper/carrier protection functions that cannot be jeopardized by confusing regulatory requirements applicable to different

³⁹ OWL at 1.

⁴⁰ 46 C.F.R. section 5.15.2(v) (emphasis added).

⁴¹ See, e.g., OWL at 7.

⁴² See OWL at 17-19

classes of entities that perform fundamentally different transportation functions in the marketplace.

F. THE BAX PETITION

The BAX petition urges the Commission to initiate a rulemaking proceeding to adopt regulations that allow some subset of NVOCCs the right to offer service contracts.⁴³

Unlike the NCBFAA proposed regulatory proceeding to consider the possibility of constructing a tariff range rate concept for NVOCCs, the BAX petition asks the Commission to undertake a rulemaking to provide some subset of NVOCCs a new affirmative right. Perhaps recognizing that the Section 16 authority does not extend to grants of affirmative relief, the BAX petition does not invoke that section in support of the requested relief.

Certainly the Commission can open a rulemaking for any legitimate purpose it sees fit. If the Commission were to consider such an effort in this context, we submit that there should be further information and explanation of the factual issues that it would want considered, as well some specificity about the approaches and the statutory basis for the possible approaches to be considered.

For example, in light of the Act's legislative history, there is little explanation of the statutory basis for the action requested the BAX petition. For example, like the UPS petition, the BAX petition poses the question of "whether the commitment of assets entitles the company to service contract authority."⁴⁴ It would appear from the Act that the commitment of assets does entitle a company to service contract authority, but the law specifies what kind of assets must be employed. The assets committed must be vessels engaged in U.S. foreign commerce – which is what the Shipping Act and the Commission regulate – not airplanes, trucks, warehouses, or other assets. As noted earlier, other NVOCCs have read and understood this and have obtained the service contracting authority sought simply by committing such assets. The BAX petition does not address this. As "one of the world's leading international freight transportation and supply chain management companies,"⁴⁵ with published revenues in excess of \$2 billion,⁴⁶ BAX, like UPS, does not explain why it could not do what the Chinese company, Sinotrans, did to achieve this objective.

Like other petitions before the Commission, the BAX petition muddies the distinctions between NVOCC and non-NVOCC services. The petition states that service contracting authority is "critical" for "third party logistics providers that offer international supply chain solutions, including forwarding, consolidation, warehouse

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 13.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 6.

management, and NVOCC services.”⁴⁷ This is not correct, because BAX clearly can and does offer forwarding, consolidation, and warehouse management services outside either FMC regulated tariffs or service contracts, and can and does successfully offer NVOCC services pursuant to FMC tariffs.

Finally, the BAX petition implies that service contracting is somehow needed in light of recent homeland security regulations, and it refers to Customs and Border Protection’s regulatory requirement that NVOCCs file shipment data.⁴⁸ This comment is nowhere explained, and its intended meaning is not apparent. Whether NVOCC shipments are pursuant to a tariff or a service contract would seem irrelevant from a security perspective. In fact, if there is a security concern in this arena, it would be raised by the OWL petition that would blur the distinction between forwarder OTIs and NVOCC OTIs. Automated NVOCCs must file manifest information in Customs’ Automated Manifest System (AMS), just as ocean carriers do, and this allows the U.S. government to conduct security screenings on such shipments prior to vessel loading. If OTIs were able to blur the forwarder-NVOCC distinction and in effect be allowed to act as carriers using “special contracts”, there is a risk that such OTIs, not clearly being NVOCCs, would not have to file advance shipment information in Customs’ AMS system. This would create substantial and counterproductive confusion and an unacceptable security loophole for any shipment moved in such a manner.

We believe that BAX is certainly correct in not basing its petition on Section 16 exemption authority, as the UPS and CHRW petitions have done. The Commission has the discretion to undertake a regulatory examination and possible rulemaking proceeding to consider the issues raised by BAX. If the Commission does so, however, we believe that it should include in such a process a clear delineation of the issues to be addressed.

G. THE CHRW PETITION

The CHRW petition, like the UPS petition but unlike the NCBFAA, OWL or BAX petitions, requests that the Commission utilize Section 16 exemption authority to confer upon it service contract authority. This approach has the same shortcomings as are discussed in Part C above regarding the UPS petition. We submit that those defects apply equally to this petition, and in the interest of brevity we will not repeat them here.

The petition recognizes that “Congress chose not to allow OTIs to offer service contracts,”⁴⁹ but nevertheless argues that the Commission should not apply that decision to it or other NVOCCs in a limited class. In this respect, at least the CHRW petition, unlike the UPS petition, tries to provide the Commission with some criteria that should be applied to the predictable flood of exemption requests that would follow. The petition

⁴⁷ *Id.* at 4. See also *id.* at 7, which adds “global airfreight,” “customs clearance and brokerage” and “deconsolidation” services to the list, all of which are also conducted outside the scope of either tariffs or service contracts regulated by the Commission.

⁴⁸ *Id.* at 4 and 14.

⁴⁹ CHRW at 22.

proposes that such exemptions be limited to NVOCCs that are “adding real value to their services,”⁵⁰ are “financially stable,”⁵¹ have an adequate, but undefined, “capital investment record,”⁵² and have a clean “regulatory history.”⁵³ While reflecting a clear desire not to propose a scheme that would exempt all 3,000 NVOCCs from the terms of the Act, and while presumably well intentioned, such criteria are exceedingly vague and imprecise.

Despite the fact that this petition tries to argue that NVOCC services somehow didn’t exist in the “OSRA days,”⁵⁴ the petition fails to address the fact that Section 16 exemption authority is not a tool available to reverse a clear, conscious statutory decision to not provide an affirmative right,⁵⁵ that the petition does not in fact seek an exemption from a requirement of the Act but the grant of an affirmative right Congress chose not to confer, that Congress clearly expressed what was required to obtain service contract authority, and that other NVOCCs have demonstrated how to comply with such requirements. Like the UPS petition, the Commission should not proceed with any action on this request for a Section 16 exemption.

H. CONCLUSION

Neither the UPS nor the CHRW petition meets the statutory criteria for granting the requested exemption pursuant to Section 16 of the Shipping Act. These petitioners have proposed that the Commission use Section 16 to grant to NVOCCs the affirmative

⁵⁰ *Id.* at 17. The petition amplifies this by noting: “The complexity and the spectrum of the services provided by the Petitioner should be a foremost criterion.” *Id.* at 25. The petition also tries to further narrow the field of NVOCCs that should be eligible under this criterion by noting that “there are some NVOCCs that to a large degree are ‘paper’ NVOs, and bring little, or no value-added services to their customer base. These NVOCCs are merely ‘wholesalers’ of transportation... . These NVOCCs compete on pricing only,” and they would not be eligible for the proposed exemption. *Id.* at 19. In addition to raising the question of how the Commission is to decide which applicant NVOCCs are qualitatively worthy of an exemption, the “value-added” services described are generally outside the scope of the Act. As such, NVOCCs can offer these services today without disclosing to anyone except their customers what prices they charge for those services. If these value-added services make up a meaningful portion of the total service and price, then disclosure of the ocean transportation portion of the total charge will not be competitively sensitive, because it will show too small a portion of the total cost to be meaningful. If the ocean rate is, on the other hand, the vast majority of the cost, then it is not clear what relevance the “value-added” distinction offered by CHRW really has.

⁵¹ *Id.* at 17 and 25. The petition also adds that a company’s long-term debt should be considered. *Id.* at 27.

⁵² *Id.* While apparently trying to distinguish NVOCCs that have “no capital investment at all in their business” (*Id.*), the petition does not state what level of capital investment should be required or what that capital should be invested in. Congress, on the other hand, addressed this issue clearly by simply requiring the company to invest enough capital to operate a single vessel in U.S. foreign commerce.

⁵³ *Id.* at 28.

⁵⁴ *Id.* at 6. Contrary to the petition’s statement, the NVOCC services described were neither “somewhat non-existent” nor “nascent” in those good old days of five years ago.

⁵⁵ The petition makes an argument that a Section 16 exemption should be considered because “when Congress amended Section 10 of the Shipping Act of 1984.. ., it chose not to include a specific prohibition against service contracts between OTIs and their customers.” *Id.* at 23. This is admittedly a novel argument, but we submit that the fact that Congress did not include a specific prohibition against something that it specifically declined to authorize is neither relevant nor persuasive.

authority to enter into service contracts. Section 16 does not authorize the Commission to expand statutory rights embodied in the Act. Instead, it authorizes the Commission to remove requirements that the Act imposes. There is a fundamental difference in the two types of authority, and the UPS and CHRW petitions both depend on the type of authority that Congress did *not* give to the Commission. Thus, although it is clear that OSRA provided the Commission with greater latitude under Section 16 to exempt regulated persons from specific requirements of the Shipping Act, it is equally clear that petitioners here have not properly stated a request for an exemption under that section. These petitions as presented should be rejected.

The OWL petition inappropriately and unnecessarily confuses the regulatory regime's differentiation between freight forwarders and NVOCCs, and does so in a manner that was clearly never contemplated by Congress. We believe that the approach recommended by OWL should not be followed. If the Commission nevertheless were to undertake a review of this proposal, we believe that it would need to closely involve the Bureau of Customs and Border Protection in light of the potential impact of the OWL recommended approach on its security responsibilities.

The BAX petition recommends that the Commission undertake a rulemaking to consider its proposal. We believe that the petition does not adequately explain the statutory basis for the rulemaking, or the criteria that it proposes for the Commission's consideration.

We nevertheless recognize that the Commission has the discretion to commence a regulatory proceeding to consider and clarify the issues raised, if it chooses to do so.

The NCBFAA petition's alternative request acknowledges the clear terms of the Act and the limitations of using Section 16 in this context, and accordingly requests the FMC to consider a tariff range rate concept. The Council would not object to the suggestion by NCBFAA of a regulatory proceeding exploring a system based on "range rates." To the extent that the Commission believes that the NCBFAA's alternative request for Commission consideration of a possible range rate rulemaking may have merit, the Council respectfully suggests that it would be appropriate to begin such a process by framing and exploring those issues further through a notice of inquiry or an advance notice of proposed rulemaking. Such a system, however, obviously raises significant questions of its own regarding the adequacy of the information that would be published, what a permissible range might be, whether record keeping would be required, what protection would be afforded to shippers, etc., but the concept does suggest a way forward that potentially could be reconciled with the common carrier obligations of the Act and the limitations on the Commission's Section 16 authority.

If the Commission also believes that there is sufficient merit to warrant a regulatory proceeding that would consider the issues raised in the BAX petition, we would suggest that the Commission in such a proceeding make certain that it identify the very different and separate issues raised by the BAX petition for inquiry.

Appendix A

WORLD SHIPPING COUNCIL
MEMBER LIST

- APL
- A.P. Moller-Maersk Sealand (including Safmarine and Torm Lines)
- Atlantic Container Line AB
- CP Ships Holdings, Inc. (including Canada Maritime, CAST, Lykes Lines, Italia Lines, Contship Containerlines, TMM lines, and ANZDL)
- China Ocean Shipping Company (COSCO)
- China Shipping Group
- CMA-CGM Group
- Compania Sud-Americana de Vapores (CSAV)
- Crowley Maritime Corporation
- Dole Ocean Cargo Express
- Evergreen Marine Corporation Ltd. (including Lloyd Triestino and Hatsu Marine)
- Great White Fleet, Ltd.
- Hamburg Sud (including Columbus Line, Alianca and Crowley American Transport)
- Hanjin Shipping Company, Ltd.
- Hapag-Lloyd Container Linie GmbH
- HUAL AS
- Hyundai Merchant Marine Company, Ltd.
- Kawasaki Kisen Kaisha Ltd. (K Line)
- Malaysia International Shipping Corporation (MISC)
- Mediterranean Shipping Company, S.A.
- Mitsui O.S.K. Lines
- NYK Line
- Orient Overseas Container Line, Ltd.
- P&O Nedlloyd Limited
- United Arab Shipping Company
- Wan Hai Lines Ltd.
- Wallenius Wilhelmsen Lines
- Yangming Marine Transport Corporation, Ltd.
- Zim Israel Navigation Company, Ltd.

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I hereby certify that on this 10th day of October, 2003, I have served the foregoing comments by first-class mail:

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